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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE FIRST NATIONAL BANK, ALBUQUERQUE, NEW MEXICO, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari be issued to review the judgment entered in the above-entitled cause by the United States Circuit Court of Appeals for the Tenth Circuit on November 2, 1942.

OPINIONS BELOW

The judgment of the District Court (R. 22) was entered without an opinion. The opinion of the Circuit Court of Appeals (R. 31–37) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 2, 1942. The jurisdiction

of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent, the presenting bank, received payment from the United States on a check which had been issued as a loan on a Veteran's adjusted service certificate, and upon which the payee's endorsement was forged. Respondent guaranteed prior endorsements. Does the so-called imposter rule apply to prevent recovery by the United States?

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and of the regulations involved are set forth in the Appendix, *infra*, pp. 15–30.

STATEMENT

The United States brought suit to recover the amount paid by the Treasurer of the United States on a check upon which the endorsement of the payee named therein had been forged and the genuineness of the endorsement had been guaranteed by the respondent, the First National Bank, Albuquerque, New Mexico (R. 5–8). At the close of the pleadings the United States moved for judgment on the pleadings (R. 12) and, on the assumption that there was no dispute as to the facts and that the only questions involved were ones of law, it submitted proposed findings of fact and conclusions of law which were denied by the Dis-

trict Court (R. 15–18), which in turn entered its own findings of fact and conclusions of law denying the motion of the United States for judgment on the pleadings (R. 18–21). The respondent thereupon moved for judgment on the pleadings, relying on the findings which the Court had theretofore made (R. 21). Its motion was granted and judgment was entered dismissing the complaint with prejudice (R. 22). While the proceedings may have been somewhat irregular in form, in substance the matter was treated by the District Court and by the parties thereto as one involving motions for summary judgment and was conceded to be such in effect by both parties in the court below.

The facts are substantially as follows: Adjusted Service Certificate No. 1,351,921 was issued by the United States to one Harry T. Goulding, a veteran of the World War (R. 19). One Harry Wesley Ott obtained possession of the certificate apparently by theft and thereafter procured and filled out an application form for a loan on the certificate which contained as an integral part thereof a certification by a notary public of Bernalillo County, New Mexico, that the applicant was known to be the veteran named in the Adjusted Service Certificate and that the signature on the application was that of the veteran (R. 10, 11, Appendix, *infra,* pp. 18–19.) The applicable regulations of the Veterans' Administration provided that before a loan be made on the security of an adjusted service certifi-

cate the person applying therefor be identified as the one entitled to the certificate, by certain designated persons including, among others, any official authorized to administer oaths (Reg. No. 4699, Appendix B, *infra*). On or about April 7, 1936 Ott presented this application, together with the adjusted service certificate, at the Veterans Facility at Albuquerque, New Mexico,[1] though whether and to what extent he had personal dealings there does not appear from the record (R. 10, 19). The loan was approved and a check for the amount of the authorized loan, $790.50, payable to the order of and addressed to Harry T. Goulding, El Fidel Hotel, Albuquerque, New Mexico, was placed in the mail. Ott, who had registered at that hotel under the name of Harry T. Goulding, received the check on April 7, 1936, and presented it to respondent for payment. An officer of respondent telephoned the notary public who had certified to the identity of the veteran and the notary stated that Ott was the man whom he had identified in the loan application (R. 19). Ott also exhibited to respondent's officers certain identifying documents the nature of which does not appear (R. 11) and

[1] The application for the loan and the certificate of identification are not included in the record. A copy of an application for loan and certificate was set forth below in the Appendix to the Brief and the court was requested to take judicial notice that a loan on an adjusted certificate could be obtained only through the execution of a similar document. The court below took judicial notice (R. 32) and it is assumed that this Court will do likewise.

respondent's officers paid Ott the proceeds of the check, believing that Ott in fact was Goulding (R. 11). Respondent endorsed the check guaranteeing prior endorsements, and forwarded it to the Denver branch of the Federal Reserve Bank of Kansas City, a fiscal agent of petitioner, where it was paid in the regular course of business (R. 6–7, 19). Notice of the forgery was given to the Veterans' Facility on April 13, 1937, and a demand for reclamation made on May 20, 1938, was refused by the bank (R. 19–20). On October 10, 1938, the bank was notified by the Federal Reserve Bank of Kansas City that the claim for reclamation "may be abandoned" (R. 20). On October 16, 1940, the demand for reclamation was renewed and was again rejected by the bank (R. 20). Suit was thereupon instituted against respondent in the United States District Court for the District of New Mexico.

The District Court concluded as a matter of law that there was no forgery and therefore no breach of guaranty (R. 20). It also concluded that the United States had been guilty of laches in failing to press its claim for recovery with reasonable diligence (R. 20.) It thereafter dismissed the complaint of the United States (R. 22). On appeal the Circuit Court of Appeals for the Tenth Circuit disapproved that part of the opinion of the District Court relating to laches of the United States, but it affirmed on the ground that the so-

called imposter rule is applicable to the United States, that the disbursing officer of the United States primarily intended the check to be payable to the order of the imposter, and that that intent may be imputed to the United States.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the imposter rule is applicable to a check of the United States.

2. In holding that the disbursing officer at the Veterans Facility at Albuquerque, New Mexico, did or intended to deliver or make payable the check to the order of the imposter rather than to the order of the veteran entitled to receive it.

3. In failing to hold that an intent on the part of an official of the Veterans Facility to make the check in question payable to the order of the imposter was unauthorized and beyond the scope of that official's authority.

4. In failing to hold that the United States cannot be estopped by the unauthorized acts or negligence of its agents and that all persons dealing with an agent of the United States or relying upon the agent's acts are chargeable with notice of the scope of the agent's authority.

5. In failing to hold that the respondent is liable to the United States for its breach of guaranty of the genuineness of its prior endorsements.

6. In failing to hold that the United States was entitled to recover the face value of the check to-

gether with interest thereon from the ninth day of April, 1936.

7. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The court below, following its prior opinion in *United States* v. *First National Bank of Prague*, 124 F. (2d) 484, held that the imposter rule, based upon a presumed intent on the part of the drawer of the check to have it paid primarily to the order of the imposter with whom the drawer was dealing rather than to the payee named in the check,[2] applied to a check of the United States. The court further held that the Veterans Facility at Albuquerque, and particularly the disbursing officer, intended that the person with whom it dealt[3] and to whom it delivered the check was to be the payee thereof, and that the imposter's endorsement con-

[2] While the United States disagreed with the conclusion reached by the Court in the *Prague* case in that respect, it could not seek review by this Court because judgment had been entered in its favor on other grounds. The judgment was paid by the Prague Bank in due course.

[3] Notwithstanding the assumption of the court below, there is nothing in the record to show that the imposter Ott applied in person to the Veterans Facility at Albuquerque, New Mexico, for the application or loan or, if he did, what dealings he had in respect of the loan with any employee or agent of the United States. In any event it is clear that the check was not delivered to him personally. It was addressed by mail to the veteran named in the certificate at a hotel address which had been given by the imposter. (R. 19). We do not regard these points as at all controlling.

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veyed good title to the check and was not a forgery.[4] We submit that the court below has incorrectly decided an important question of law relating to the rights and liabilities of the United States in respect of its negotiable paper in a manner inconsistent with a controlling decision of this Court and in conflict with the decisions of lower federal courts.

1. The decision below is in conflict with that of this Court in *United States* v. *National Exchange Bank of Providence,* 214 U. S. 302, and with that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Onondaga County Savings Bank,* 64 Fed. 703. In the *National Exchange Bank* case and the *Onondaga County Savings Bank* case imposters, who deceived Government officials as to their true identity, fraudulently procured the issuance and the delivery to them of pension checks payable to the order of persons presumably entitled thereto and forged the endorsements of the

[4] The court below considered the question whether state or federal substantive law applied and concluded that the rights and liabilities of the United States in respect of the check did not depend upon local law except to the extent that the United States had consented to be bound thereby. It found it unnecessary to decide whether the United States had consented to be bound by New Mexico law, as the courts of that state had not passed upon the imposter rule. The question whether state or federal law controls the rights and liabilities of the United States in respect of its negotiable paper is now pending before this Court in *Clearfield Trust Company, et al.* v. *United States of America,* No. 490, this Term.

named payees.[5] In both cases the United States was held entitled to recover from the cashing banks which had received payment from the United States. It is true that neither of these cases discussed the "imposter rule" as such, but factually they presented the same problem as is here involved. At the time the *Exchange Bank of Providence* case was decided, many cases involving the imposter rule were to be found in the reports,[6] and

[5] The voucher prepared for the issuance of a pension check contained identification provisions similar to those contained in the application for a loan employed by the Veterans' Administration. The officer before whom the voucher was to be executed was required to see that the correct post office address of the pensioner was inserted on the face and back of the voucher. He was required to examine the pension certificate and the pensioner was to be fully identified by him. A blank copy of the voucher taken from the record in this Court in the *Exchange Bank of Providence* case, No. 90, October Term, 1908, is, for the information of the Court, set forth in Appendix C, *infra*, pp. 25–30.

[6] *Emporia National Bank* v. *Shotwell*, 35 Kans. 360 (1886); *Robertson* v. *Coleman*, 141 Mass. 231 (1886); *United States* v. *National Exchange Bank*, 45 Fed. 163 (C. C. E. D. Wisc. 1891); *Crippen, Lawrence & Co.* v. *American Nat'l Bank*, 51 Mo. App. 508 (1892); *Meridian Nat'l Bank* v. *First Nat'l Bank of Shelbyville*, 7 Ind. App. 322 (1893); *Land Title & Trust Co.* v. *Bank*, 190 Pa. 236 (1900); *Hoffman* v. *American Exchange Nat. Bank* (Neb.), 96 N. W. 112 (1901); *Tolman* v. *American National Bank*, 22 R. I. 462 (1901); *First Nat. Bank* v. *American Ex. Nat. Bank*, 170 N. Y. 88 (1902). See the Brewster-Ames controversy (Brannan, *Negotiable Instrument Law*, 3d Ed., Appendix). The imposter rule has no counterpart in the English decisions and is one of recent origin. It is considered by some authorities to be an outgrowth of the imposter rule in the law of sales. Williston, *Contracts* (Rev. Ed.) Sec. 1517.

it must be assumed that both court and counsel were familiar with it. The same observation also applies to the *Onondaga* case. It is implicit in both of these decisions that the imposter rule was considered not to apply to a check of the United States issued in payment of a pension.

The court below, while expressly recognizing that the *Exchange Bank of Providence* case reached an opposite result on analogous facts (R. 34), sought to treat that case as having been modified by subsequent decisions of this Court in *United States* v. *Chase National Bank,* 252 U. S. 485 and *United States* v. *National Exchange Bank of Baltimore,* 270 U. S. 527. Both of those cases, however, involved the extent to which the doctrine of *Price* v. *Neal,* 1 W. Black. 390, 3 Burr. 1354, applied to a check of the United States. The *Chase Bank* case held that under the rule of *Price* v. *Neal,* the United States was bound to know the signature of the drawer and that where the drawer and the payee were the same person and both signatures had been forged, the United States could not recover by limiting its claim to one based upon a forged endorsement. The *Exchange Bank of Baltimore* case, following generally the doctrine laid down by Mr. Justice Story in *Bank of the United States* v. *Bank of Georgia,* 10 Wheat. 333, concluded that the United States was in effect both the drawer and the drawee of a government check and was therefore chargeable with knowledge of the amount thereof

as well as the signature of the drawer. The *Exchange Bank of Providence* case, however, presented no such questions.[7] Accordingly, it is clear that the two decisions of this Court upon which the Circuit Court of Appeals rested its distinction do not modify the holding of the *Exchange Bank of Providence* case in any way.

No attempt was made by the Circuit Court of Appeals to distinguish the *Onondaga County Savings Bank* case. And the court recognized that two recent district court cases have refused to apply the imposter rule in suits by the United States to recover on the forged endorsement of a check issued as a loan upon a veteran's adjusted service certificate. *United States* v. *Canal Bank & Trust Co.*, 29 F. Supp. 605 (E. D. La.); *United States* v. *National City Bank*, 28 F. Supp. 144 (S. D. N. Y.)

2. The decision of the court below is also in substantial conflict with that of the Court of Appeals for the District of Columbia in *District National Bank* v. *Washington Loan & Trust Company*, 65 F. (2d) 831. While the United States was not a

[7] The critical question before this Court in the *Exchange Bank of Providence* case was whether the right of the United States to recover payment made on a forged endorsement was conditioned on the giving of prompt notice of the discovery of the forgery. The statement of the court below (R. 34) that the *Exchange Bank of Providence* case "rested upon the question of whether the United States should be held to the rule that a drawer or the maker of a check should be held to know the genuineness of its own paper" is apt to be misleading.

party to that suit, the court there rejected an imposter argument similar to that advanced by respondent in the instant case. Where the drawer is the United States, even more compelling reasons exist for refusing to attribute to it an intent to make its check payable to the order of imposters.

Section 502 of the World War Adjusted Compensation Act of 1924 as amended, *infra*, p. 15, authorized the Veterans' Bureau to make statutory loans to veterans upon the security of their adjusted service certificates. Section 503 of the Act, *infra*, p. 16, provided that any negotiation, assignment or pledge of the certificate as security for a loan except as authorized was null and void, thus narrowing the potential uses to which the certificate could be put. For the purpose of carrying the Act into effect, the Veterans' Administration issued regulations (Appendix B, *infra*) which authorized any regional office to make a loan on the adjusted service certificate. They also provided that the loan could be made only to the veteran named in the certificate and that the person applying therefor must be identified by certain designated public officials or otherwise responsible persons to be the veteran named in the certificate which was pledged as security (Reg. 4699, Appendix B, *infra*). The regulations also specifically provided that no employee of the Finance Service in the central office or the finance activity of a field station could act as an identifying officer. This obviously resulted in removing from the jurisdiction of the disbursing

officer the right to determine whether the individual who was applying for a loan was in fact the veteran named in the certificate. When the meticulous care with which the Government surrounded the granting of a loan upon the certificate is considered, it is anomalous to suggest that the United States intended that any person presenting a certificate, irrespective of whether he was the veteran named therein, would be able to obtain good title to the check which the United States was issuing against the certificate. The appropriate statutes and regulations make it clear therefore that the United States intended the veteran named in the certificate and that veteran alone to be the payee of the check which constituted the loan. See *United States* v. *National City Bank*, 28 F. Supp. 144, 148–149 (S. D. N. Y.).[8]

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[8] The majority of the cases commonly cited in support of the imposter rule were cases where the imposter assumed a fictitious name rather than one having relation to the drawer's obligation. In this group of cases no objection can be taken to the action of a court in ascribing an intent to the drawer to have the check payable to the order of the person with whom he deals. *Forbes & King* v. *Espy, Heidelbach & Co.*, 21 Ohio State 474; *Meridian Nat'l Bank* v. *First Nat'l Bank of Shelbyville*, 7 Ind. App. 322; *Montgomery Garage Co.* v. *Manufacturers, &c., Co.*, 94 N. J. L. 152; *Milner* v. *First National Bank*, 38 Ga. App. 668; *Corinth Bank & Trust Co.* v. *Security National Bank*, 148 Tenn. 136; *Halsey* v. *Bank of New York & Trust Co.*, 270 N. Y. 134; *Sherman* v. *Corn Exchange Bank*, 91 App. Div. (N. Y.) 84; *cf. Robertson* v. *Coleman*, 141 Mass. 231; *Karoly Construction Co.* v. *Globe Savings Bank*, 64 Ill. App. 225.

3. The question is one of substantial importance. *United States* v. *National Exchange Bank,* 45 Fed. 163 (C. C. E. D. Wis.), which was decided in 1891, for years stood as the only case in which the imposter doctrine had been applied to a check of the United States. In recent years, however, a contrariety of views has arisen among lower federal courts as to the applicability of that rule to checks of the United States. Compare *United States* v. *National City Bank,* 28 F. Supp. 144 (S. D. N. Y.) and *United States* v. *Canal Bank & Trust Co.,* 29 F. Supp. 605 (E. D. La.) with *Security-First National Bank* v. *United States,* 103 F. (2d) 188 (C. C. A. 9) and *United States* v. *First National Bank & Trust Company,* 17 F. Supp. 611 (W. D. Okla.). Cases are constantly arising which involve the application of the so-called imposter rule to checks of the United States, and a number of such cases are now pending. The desirability of an authoritative ruling on the question by this Court is evident, particularly in the light of the fact that owing to the constantly increasing number of checks which the Government issues, an increasing number of cases involving the imposter question may be expected.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1943.